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COURT OF CRIMINAL APPEALS
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PD-0578-16

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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EX PARTE
ADAM WAYNE INGRAM

ON DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO
CAUSE NO. 04-15-00459-CR

APPEALED FROM THE 186TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS
CAUSE NOS. 2014-CR-3210 & 2015-W-0279

STATE'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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ON CITATIONS TO THE RECORD

The record in this case is brief but somewhat confusing, and the State will here attempt to clarify its citations to the record. There are two trial court cause numbers pertinent to this appeal. The first is **2014-CR-3210**, and the second is **2015-W-0279**. Two distinct volumes of Reporter's Record were generated, one for each cause number. Two distinct volumes of the Clerk's Record were also generated, one originally requested by Petitioner and another by a supplemental request from the State.

Citations to the originally filed Clerk's Record (from 2015-W-0279) will be as "CR" followed by the page number. Example: (CR 10) Citations to the supplemental record (from 2014-CR-3210) will be as "CR Supp." followed by the page number. Example: (CR Supp. 10)

Citations to the Reporter's Record will be as "RR", followed by the cause number and the page number. Example: (RR 2015-W-0279 at 10).

STATEMENT OF THE CASE

This case concerns the constitutionality of Penal Code § 33.021(c) – Texas's *Online Solicitation of a Minor* offense. The case arises from the trial court's denial of Petitioner's pretrial writ of habeas corpus which challenged the facial validity of the statute on various constitutional grounds. The Fourth Court of Appeals affirmed the trial court's ruling, and Petitioner sought and was granted discretionary review by this Court.

STATEMENT REGARDING ORAL ARGUMENT

When this Court granted discretionary review of the decision of the court below, it stated that oral argument would not be permitted. In his Brief on the Merits, Petitioner reiterated his request that oral argument be permitted in this case. The State here joins Petitioner in requesting oral argument be permitted and respectfully recommends that this Court reconsider its decision denying oral argument in this case.

This case concerns the validity of a criminal offense which is of great importance in protecting the children of Texas as well as holding culpable those who would prey upon those children. Oral argument would allow the Members of the Court to explore with the parties the application of the constitutional principles at issue more thoroughly than the constraints of briefing alone would permit.

This Court recently granted discretionary review and permitted oral argument in the case of *Leax v. State*,[1] presenting the issue of: "Whether Section 33.021(c) of the Texas Penal Code is a content-based restriction." (Brief for Jeromy John Leax at 3) The State respectfully suggests that hearing oral argument contemporaneously presented in both in of these cases would benefit the Court in the disposition of the issues presented by each.

[1] *Leax v.* State, PD-0517-16; *on review from Leax v. State*, Nos. 09-14-00452-CR, 09-14-00453-CR, 2016 Tex. App. LEXIS 3768, at *6 (Tex. App.—Beaumont, April 13, 2016, pet. granted) (mem. op., not designated for publication).

STATEMENT OF FACTS

This case concerns a challenge to the facial constitutionality of Penal Code § 33.021 (Online Solicitation of a Minor). Accordingly, no record of the factual circumstances of Petitioner's alleged offense was developed in the trial court.

Petitioner is charged by indictment with one count alleging a violation of Penal Code § 33.021(c) – *Online Solicitation of a Minor* – alleged to have occurred May 21, 2013. (CR Supp. 4) During this interlocutory appeal, the indictment stands pending before the 186th District Court of Bexar County in a cause numbered 2014-CR-3210.

a. Petitioner's first application for pretrial writ of habeas corpus

On January 5, 2015, Petitioner filed an application for pretrial writ of habeas corpus presenting various facial challenges to section 33.021(c). (CR Supp. 7-21) The trial court denied the writ of habeas corpus on February 5, 2015. (CR Supp. 25) No appeal of this denial was taken.

b. Petitioner's subsequent application for pretrial writ of habeas corpus

On July 14, 2015, Petitioner filed a subsequent application for writ of habeas corpus that was substantively identical to the first except for the District Clerk's assignment of a new cause number: 2015-W-0279. (CR 3-15) Petitioner also filed the same application under cause number "CR2014-3210" (CR Supp. 26-40), along with a "Motion to Set Aside Order Denying Relief," which prayed that the

trial court vacate its previous order denying his first pretrial writ of habeas corpus. (CR Supp. 42-46) That same day, the trial court held a hearing on the subsequent writ and motion to vacate. (RR 2014-CR-3210) The trial court granted Petitioner's Motion to Set Aside the previous order denying the first pretrial application for writ of habeas corpus. (RR 2014-CR-3210 at 5) The State excepted to the trial court's ruling and contended that the court lacked jurisdiction to rescind or vacate its order denying the writ some five months previously. (RR 2014-CR-3210 at 5) The same day, a separate hearing was held on the subsequent writ filed under cause number 2015-W-0279. (RR 2015-W-0279) Petitioner declined to put on any evidence at this hearing. (RR 2015-W-0279 at 6) The State argued that this was a subsequent pretrial writ advancing the same issues as the first writ and therefore should not be considered on its merits. (RR 2015-W-0279 at 5) The trial court then denied the subsequent writ. (RR 2015-W-0279 at 6) (CR 16).

c. Appeal to the Fourth Court of Appeals

Petitioner appealed the trial court's denial of his subsequent pretrial writ to the Fourth Court of Appeals which issued an opinion in *Ex parte Ingram*, No. 04-15-00459-CR, 2016 Tex. App. LEXIS 4331, 2016 WL 1690493 (Tex. App.—San Antonio, Apr. 27, 2016, pet. granted) (mem. op., not designated for publication). The court of appeals first held that it did have jurisdiction to hear an appeal of

Petitioner's subsequent writ, because the trial court's February 15, 2015 order denying Petitioner's first application for writ of habeas corpus was not a ruling on the merits of the writ. *Id*. at 6-7. The court below then considered and overruled each of Petitioner's complaints that Penal Code § 33.021(c) was facially unconstitutional. *Id.*

Petitioner thereafter sought and was granted discretionary review by this Court.

ISSUES PRESENTED

1. Whether the defense-preclusion provisions of Texas Penal Code § 33.021(d) – *Online Solicitation of a Minor* – negate the mens rea of the statute's offense or prevent him from presenting a defense in violation of Petitioner's right to due process and right to present a defense.

2. Whether Texas Penal Code § 33.021(c) – *Online Solicitation of a Minor* – is an unconstitutional content-based restriction on speech or is overbroad in that it encompasses in its sweep a substantial amount of protected speech.

3. Whether Texas Penal Code § 33.021(c) – *Online Solicitation of a Minor* – is unconstitutionally vague.

4. Whether Texas Penal Code § 33.021(c) – *Online Solicitation of a Minor* – violates the Dormant Commerce Clause.

5. Whether recent legislative amendments to Texas Penal Code § 33.021 – *Online Solicitation of a Minor* – should apply retroactively to Petitioner's alleged conduct.

SUMMARY OF THE ARGUMENT

1. DUE PROCESS AND RIGHT TO PRESENT A DEFENSE

Petitioner complains that the lower court erred in holding that Penal Code §§ 33.021(c) and (d) do not offend his rights to due process, due course of law, and presentation of a defense. These complaints are without merit, because (1) these claims are not cognizable in a pretrial writ of habeas corpus; and (2) subsections (c) and (d) of Penal Code § 33.021 concern two distinct specific intents that do not conflict, negate one another, or prevent a defendant from presenting a defense to the elements of the statute.

2. CONTENT-BASED SPEECH RESTRICTION AND OVERBREADTH

Petitioner complains that the lower court erred in holding that Penal Code § 33.021(c) is not a content-based restriction on speech or, alternatively, an unconstitutionally overbroad infringement on protected speech. This complaint is without merit as the lower court correctly held that the statute (1) does not implicate First Amendment speech protections, because offers to engage in an illegal transactions—such as sexual assault of a child—are not protected by the Free Speech Clause; and (2) does not include within its sweep a substantial amount of protected speech.

3. VAGUENESS

Petitioner complains that the lower court erred in holding Penal Code § 33.021(c) is not unconstitutionally vague. This point is insufficiently briefed and without merit as the two statutory subsections at issue are separate and distinct, providing sufficient definiteness to allow persons of ordinary intelligence what conduct is prohibited, and the statute does not permit arbitrary and discriminatory enforcement.

4. DORMANT COMMERCE CLAUSE

Petitioner also complains the lower court erred in holding that that Penal Code § 33.021 does not violate the "Dormant Commerce Clause" of United States Constitution. This complaint is without merit as the lower court correctly held that the statute (1) does not discriminate between intra and interstate commerce and (2) serves the important governmental interest of protecting children from online sexual predators, while the burden it places on interstate commerce is, at most, incidental.

5. RETROACTIVITY OF STATUTORY AMENDMENTS

Petitioner contends that recent amendments to Penal Code § 33.021 should be applied "retroactively" or otherwise confer some persuasive force to the benefit his claims. Petitioner's arguments are without merit, because (1) the amended statute cannot be applied retroactively as the Legislature clearly and validly mandated that the previous version of the statute would apply to offenses committed before September 1, 2015, and (2) the amended statutes carry no persuasive weight as viewing statutory amendments as a persuasive factor in an analysis of a statute's constitutionality would chill the Legislature's inclination to reform laws.

ARGUMENT AND AUTHORITIES

1. DUE PROCESS AND RIGHT TO PRESENT A DEFENSE

Petitioner complains that the lower court erred in holding that Penal Code §§ 33.021(c) and (d) do not offend his rights to due process, due course of law, and presentation of a defense. Specifically, Petitioner argues that specific intent of subsection (c) – which requires the actor to solicit a minor to meet *with the intent that the minor will engage in sexual activity* – is negated by the defense-preclusion provision of subsection (d) which states that it is not a defense that the actor was *engaged in a fantasy* or *did not intend for the meeting to occur*. Petitioner contends that this results in an unconstitutional annulment of the statue's mens rea. (Petitioner's Brief at 4) He further claims this intent-negation violates his right to present a defense by rendering him "deprived from defending against the key element of the crime—intent," because "the factfinder cannot consider what the defendant was actually intending to do at the time of the alleged 'solicitation.'" (Petitioner's Brief at 7) These complaints are without merit, because (1) these claims are not cognizable in a pretrial writ of habeas corpus; and (2) subsections (c) and (d) of Penal Code § 33.021 concern two distinct specific intents that do not conflict, negate one another, or prevent a defendant from presenting a defense to the elements of the statute.

a. This claim is not cognizable in a pretrial writ of habeas corpus.

The State initially contends, as it did in the court below, that Petitioner's complaints that Penal Code § 33.021(d) deprives him of his rights to due process and presentation of a defense, are not cognizable in a pretrial writ of habeas corpus. This is because (1) granting Petitioner relief on this point would not result in his immediate release, and (2) these claims concern procedural rather than substantive rights.

(1) Relief on this point would not result in immediate release.

This Court recently wrote on the cognizability of various types of pretrial habeas corpus claims in *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App., Feb. 24, 2016). Although the opinion of the Court was fractured on the issue of cognizability, Presiding Judge Keller's opinion restated several long-standing principles of pretrial habeas cognizability, including the fundamental principle that the purpose of habeas corpus is relief from unlawful confinement: "Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release." *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016). "The purpose of a writ of habeas corpus is to obtain a speedy and effective adjudication of a person's right to liberation from illegal restraint." *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002).

If this Court were to find merit in Petitioner's due process and Sixth

Amendment complaints – that subsection (d) unconstitutionally negates the intent element in the criminal offense of subsection (c) – the remedy would be the deletion of all or part of subsection (d). The offense in subsection (c) would remain intact as it may be given effect without the invalidated portion of the statute. Tex. Gov't Code 311.032(c);[2] Tex. Penal Code § 1.05(b).[3] Consequently, the indictment pending against Petitioner – alleging an offense under Penal Code § 33.021(c)–would remain in effect, and Petitioner would not be subject to immediate release.

Because the due process and Sixth Amendment complaints raised by Petitioner, if resolved in his favor, would not result in his immediate release, these claims are not cognizable in a pretrial writ of habeas corpus. Accordingly, these grounds should be disregarded as non-cognizable in this interlocutory appeal.

(2) Penal Code § 33.021(d) concerns a procedural rather than a substantive right.

[2] Texas Government Code § 311.032(c) [Severability of Statutes] provides:

> (c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

[3] Texas Penal Code § 1.05(b) [Construction of Code] provides:

> (b) Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code.

Presiding Judge Keller's opinion in *Perry* also recognized that pretrial habeas corpus actions exist for the vindication of *substantive* rather than *procedural* rights:

> Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy. This remedy is reserved "for situations in which the **protection of the applicant's substantive rights** or the conservation of judicial resources would be better served by interlocutory review."

Ex parte Perry, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016) (emphasis supplied); *quoting Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001); *see also Perry* at 918-922 (Alcala, J., concurring) (Discussing appropriate factors for "discerning whether the **substantive** right at issue may be decided through a pretrial writ.") (emphasis supplied).

Penal Code § 33.021(d) – the *defense preclusion* provision – is a rule of exclusion which restricts the accused from presenting certain lines of evidence. The subsection provides:

> (d) It is not a defense to prosecution under Subsection (c) that:
> (1) the meeting did not occur;
> (2) the actor did not intend for the meeting to occur, or
> (3) the actor was engaged in a fantasy at the time of the commission of the offense.

Tex. Penal Code § 33.021(d).

Subsection (d) seeks to narrow the scope of relevant issues at trial by excluding evidence which may tend to mislead or distract the jury in its decision of

whether the evidence proves the elements of the offense. Regardless of whether this provision satisfies the concerns of due process or the Sixth Amendment, it is an evidentiary rule.

Evidentiary rules (with the exception of those protecting privileges) are considered procedural in nature and do not create substantive rights. *See Gonzalez v. Stat*e, 45 S.W.3d 101, 105 (Tex. Crim. App. 2001) (Describing evidentiary rules as procedural, except for privileges, in a choice of law analysis.) As such, complaints regarding procedural rules of evidentiary preclusion are not cognizable in a pretrial habeas action. To hold otherwise would authorize and invite pretrial litigation of complaints regarding all manner of evidentiary proscriptions contained in the Rules of Evidence, Penal Code, Code of Criminal Procedure, and any other arguably applicable source.

Because Penal Code § 33.021(d) is a rule of evidentiary exclusion that concerns procedural rather than substantive rights, a complaint that subsection (d) violates due process or the right to present a defense is not cognizable in a pretrial writ of habeas corpus. Accordingly, these grounds should be disregarded as non-cognizable in this interlocutory appeal.

b. Subsections (c) and (d) refer to two distinct specific intents, and the later does not "negate" the former.

Petitioner incorrectly asserts that the defense preclusion provisions of Penal Code § 33.021(d) operate to negate the specific intent required by the predatory

solicitation offense of 33.021(c). The fundamental flaw in Petitioner's contention is his confusion of the two distinct mental states described by subsections (c) and (d) and when each becomes applicable relative to the act of solicitation. Subsection (c) requires a specific sexual intent that applies at the time the solicitation occurs, while subsection (d) limits a defense regarding a specific intent to meet after the completion of the solicitation.

Subsection (c) – the "solicitation provision" – proscribes certain conduct as criminally offensive when coupled with a specific intent:

> (c) A person commits an offense if the person […], knowingly solicits a minor to meet another person, including the actor, **with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate intercourse with the actor or another person.**

Tex. Penal Code § 33.021(c) (emphasis added).

The effect of the emphasized language above is to require the State to prove that the solicitation of a minor was done with the specific intent that the minor will engage in sexual activity. Merely soliciting a minor to meet – without evidence of specific sexual intent – is not a criminal offense. Thus, the specific intent element of subsection (c) is the mens rea attached to the act of solicitation which criminalizes otherwise innocent conduct.

Next, subsection (d) – the "defense preclusion provision" – explicitly excludes three potential defenses from consideration, and reads as such:

> (d) It is not a defense to prosecution under Subsection (c) that:

> (1) the meeting did not occur;
> (2) **the actor did not intend for the meeting to occur**, or
> (3) the actor was engaged in a fantasy at the time of the commission of the offense.

Tex. Penal Code § 33.021(d) (emphasis added).

The defense preclusion provision of subsection (d)(2) disallows a defendant from contending that he never actually intended to meet the minor with whom he previously solicited a meeting with the intent to engage in sexual activity. Subsection (d)(2) concerns a specific intent to effect a meeting that is distinct in character and operation from the specific sexual intent of subsection (c). Subsection (c)'s specific *sexual* intent criminalizes the otherwise innocent act of asking a minor to meet, and that intent operates at the time of the act of solicitation. On the other hand, subsection (d) concerns the actor's intent to actually *effectuate a meeting* with the minor, and it operates after the completion of the act of solicitation.

Subsections (c) and (d)(2), when read in conjunction, clearly and reasonably state that *it is a crime to solicit a minor to meet, with the intention that the minor will engage in sexual activity,* and *it doesn't matter if you then never actually intended to meet the minor*. The activity criminalized by subsection (c) is the indecent solicitation of a minor through electronic means, not the ultimate meeting with the minor. Subsection (d) serves to clarify the issue before the trier of fact by focusing on the gravamen of the offense: the act of soliciting a minor for sex. *See*

*Ex parte L*o, 424 S.W.3d 10, 16-17 (Tex. Crim. App. 2013) ("It is the conduct of requesting a minor to engage in sexual acts that is the gravamen of the offense.") Therefore, subsection (d) does not negate the separate specific intent element of subsection (c), nor does subsection (d) prevent a defendant from challenging the State's proof as to the specific intent element of subsection (c).

c. Every court of appeals to have considered the issue has recognized that subsections (c) and (d) concern different specific intents.

A number of courts of appeals have confronted claims similar to the one presented by Petitioner, and every such court has found no difficulty in distinguishing the specific sexual intent of subsection (c) from the meet-up intent described by subsection (d). The San Antonio Court of Appeals was the first to have considered the issue of whether these subsections "contradict each other on the intent element, thereby causing the statute to be internally inconsistent and unconstitutional on its face." *Ex parte Zavala*, 421 S.W.3d 227, 230 (Tex. App.—San Antonio 2013, pet. ref'd). The *Zavala* court concisely articulated the distinction between the two intents by explaining when each applied in the commission of the offense:

> The crime of soliciting a minor under section 33.021(c) is committed, and is completed, at the time of the request, i.e., the solicitation. The requisite intent arises within the conduct of soliciting the minor, and must exist at the time of the prohibited conduct of solicitation. Indeed, it is the requirement that the defendant must solicit "with the intent that the minor will engage in sexual contact" that operates to make

> otherwise innocent conduct, i.e., soliciting a minor to meet, into criminal conduct. It follows then, that for purposes of a subsection (c) solicitation offense, it does not matter what happens after the solicitation occurs because the offense has been completed; it does not matter whether the solicited meeting actually occurs, or that the defendant did not intend for the meeting to actually occur, or that the defendant was engaged in a fantasy at the time of the solicitation. Tex. Penal Code Ann. § 33.021(d). Thus, subsection (d) does not conflict with or negate the intent element of the solicitation-of-a-minor offense defined by (c).

Ex parte Zavala, 421 S.W.3d at 232.

The San Antonio Court of Appeals' sound reasoning was subsequently adopted by a number of the other courts of appeals, every one of which held that Penal Code §§ 33.021(c) and (d) did not negate offense's mens rea, present an impermissible internal conflict, or otherwise violate due process.[4]

[4] *See:*

- *Alvarez v. State*, No. 11-15-00201-CR, 2016 Tex. App. LEXIS 2223, 2016 WL 859363, at *2-3 (Tex. App.—Eastland Mar. 3, 2016, pet. filed) (mem. op., not designated for publication);
- *State v. Paquette*, 487 S.W.3d 286, 290 (Tex. App.—Beaumont Feb. 24, 2016, no pet);
- *Ex Parte Fisher*, 481 S.W.3d 414, 417-20 (Tex. App.—Amarillo 2015, pet. ref'd);
- *Coe v. State*, Nos. 09-13-00409-CR, 09-13-00410-CR, 2015 Tex. App. LEXIS 6374, at *7 (Tex. App.—Beaumont 2015, pet. ref'd);
- *Ex parte Wheeler*, 478 S.W.3d 89, 93-94 (Tex. App. – Houston [1st Dist.] 2015, pet. ref'd);
- *Ex parte Victorick*, No. 09-13-00551-CR, 2014 Tex. App. LEXIS 5429, 2014 WL 2152129, at *2-6 (Tex. App.-Beaumont 2014, pet. ref'd) (mem. op., not designated for publication);
- *Collins v. State*, 479 S.W.3d 533, 540-41 (Tex. App.—Eastland 2015, no pet.) (upholding portion of section 21.12(a)(3), "Improper Relationship Between Educator and Student," which incorporates section 33.021(c)).
- *Ex parte Reighley*, No. 10-16-00225-CR, 2016 Tex. App. LEXIS 11099 (Tex. App.—Waco, October 12, 2016, no pet. h.) (mem. op., not designated for publication) ("We

d. The lower court's holding is correct and should be affirmed.

In overruling Petitioner's due process and Sixth Amendment complaints, the court below held consistent with its *Zavala* decision that "Penal Code § 33.021(c) contains a mens rea requirement," and "disagree[d] with Ingram's argument that subsection (d) negates the mens rea requirement of subsection (c)." *Ex parte Ingram*, No. 04-15-00459-CR, 2016 Tex. App. LEXIS 4331, 2016 WL 1690493, at *10 (Tex. App.—San Antonio, Apr. 27, 2016, pet. granted) (mem. op., not designated for publication). The court of appeals applied the appropriate principles of law and exercised sound reasoning in reaching the correct holding that Petitioner's due process and Sixth Amendment complaints are without merit. Accordingly, the holding of the lower court should be affirmed.

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agree with the analysis in *Zavala* and conclude Section 33.021(c) and (d) are not contradictory.").

- *Ganung v. State*, No. 09-16-00018-CR, 2016 Tex. App. LEXIS 10300, at *4 (Tex. App.—Beaumont, September 21, 2016, no pet.) (mem. op., not designated for publication) ("[W]e conclude that subsection (d) does not conflict with or negate the intent element of the solicitation-of-a-minor offense defined by (c).").
- *Salgado v. State*, __ S.W.3d __, No. 09-15-00203-CR, 2016 Tex. App. LEXIS 3789, 2016 WL 1469131(Tex. App.—Beaumont April 13, 2016, no pet.) ("The requirement that the defendant must solicit 'with the intent that the minor will engage in sexual contact'… operates to make otherwise innocent conduct, i.e., soliciting a minor to meet, into criminal conduct.").
- *Ex parte Spies*, No. 01-14-00925-CR, 2016 Tex. App. LEXIS 3709, at *8 (Tex. App.—Houston [1st Dist.], April 12, 2016, no pet.) (mem. op., not designated for publication)
- *Chapman v. State*, No. 11-15-00215-CR, 2016 Tex. App. LEXIS 2231, at *5 (Tex. App.—Eastland, March 3, 2016, pet. filed) (mem. op., not designated for publication) ("Section 33.021(c), even when combined with former subsections (d)(2) and (d)(3), regulates conduct.")

2. CONTENT-BASED SPEECH RESTRICTION AND OVERBREADTH

Petitioner complains that the lower court erred in holding that Penal Code § 33.021(c) is not an unconstitutionally overbroad infringement on protected speech. Petitioner contends that the statute "is a content-based restriction that severely criminalizes a substantial amount of speech protected by the First Amendment."[5] (Petitioner's Brief at 12) This complaint is without merit as the lower court correctly held that the statute (1) does not implicate First Amendment speech protections and (2) does not include within its sweep a substantial amount of protected speech.

a. Penal Code § 33.021(c) does not implicate the First Amendment, because offers to engage in illegal transactions – such as sexual assault of a child – are categorically excluded from First Amendment protection.

The first question to be asked in any constitutional analysis is whether constitutional protections are even implicated. In the context of speech, the First Amendment's protections are only implicated where the government seeks to regulate **protected speech**. *See Scott v. State*, 322 S.W.3d 662, 668-669 (Tex. Crim. App. 2010). "It is the obligation of the person desiring to engage in the

[5] This Court has recently granted discretionary review in a case presenting the issue of "Whether Section 33.021(c) of the Texas Penal Code is a content-based restriction." Brief for Jeromy John Leax, Petitioner, *Leax v. State*, PD-0517-16, pet. granted Sept. 21, 2016; *on review from Leax v. State*, Nos. 09-14-00452-CR, 09-14-00453-CR, 2016 Tex. App. LEXIS 3768, at *6 (Tex. App.—Beaumont, April 13, 2016, pet. granted) (mem. op., not designated for publication).

assertedly expressive conduct to demonstrate that the *First Amendment* even applies." *Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

The United States Supreme Court has recognized that "speech integral to criminal conduct" is among the species of communication that finds no protection in the First Amendment. *United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2544 (2012). "Offers to engage in illegal transactions are categorically excluded from First Amendment protection. *United States v. Williams*, 553 U.S. 285, 297 (2008) (Holding that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment").

(1) This Court held in *Ex parte Lo* that soliciting minors for sex is categorically excepted from First Amendment protection.

In *Ex parte Lo*, this Court held that the *sexually explicit communications* offense contained in Penal Code § 33.021(b) was unconstitutionally overbroad in that it prohibited within its sweep a substantial amount of speech protected by the First Amendment not narrowly tailored to achieve its legitimate interest. 424 S.W.3d 10 (Tex. Crim. App. 2013). In reaching this conclusion, this Court distinguished the speech-prohibition of the *sexually explicit communications* provision – subsection (b) – from the conduct-prohibition of the *solicitation* provision – subsection (c). The *Lo* Court held that, while communicating in a sexually explicit manner with a minor encompassed protected speech, soliciting a

minor to engage in sexual conduct was outside the ambit of First Amendment protection:

> Such solicitation statutes exist in virtually all states and have been routinely upheld as constitutional because "offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from First Amendment protection."

Ex parte Lo, 424 S.W.3d 10, 16-17 (Tex. Crim. App. 2013) (bracketed text in original); *quoting United States v. Williams*, 553 U.S. 285, 297 (2008). Since this Court's decision in *Ex parte Lo*, every Texas court of appeal to have considered the facial constitutionality of Penal Code § 33.021(c) has relied on this Court's holding that subsection (c) regulates unprotected conduct rather than protected speech.[6]

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[6] *See:*

- *Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2013, pet. ref'd) (Relying on *Lo* in holding that subsection (c) regulates conduct, not speech.)
- *Ex parte Wheeler*, 478 S.W.3d 89, 94 (Tex. App.—Houston [1st Dist.] 2015 pet. ref'd) (Holding Penal Code § 33.021(c) regulates conduct not speech.)
- *Ex parte Victorick*, No. 09-13-00551-CR, 2014 Tex. App. LEXIS 5429 (Tex. App.—Beaumont 2014, pet. ref'd); *State v. Paquette*, 487 S.W.3d 286 (Tex. App.—Beaumont, Feb. 24, 2016, no pet.); *Ex parte Goetz*, No. 09-15-00409-CR, 2016 Tex. App. LEXIS 3223, at *4 (Tex. App.—Beaumont, March 30, 2016, pet. dism'd) (mem. op., not designated for publication); *Salgado v. State*, __ S.W.3d __, No. 09-15-00203-CR, 2016 Tex. App. LEXIS 3789, 2016 WL 1469131(Tex. App.—Beaumont April 13, 2016, no pet.); *Elzarka v. State*, No. 09-15-00078-CR, 2016 Tex. App. LEXIS 3771, at *4 (Tex. App.—Beaumont April 13, 2016, no pet.) (mem. op., not designated for publication); *Ganung v. State*, No. 09-16-00018-CR, 2016 Tex. App. LEXIS 10300, at *4 (Tex. App.—Beaumont, September 21, 2016, no pet.) (mem. op., not designated for publication)
- *Mower v. State*, No. 03-14-00094-CR, 2016 Tex. App. LEXIS 3539, 2016 WL 1426517, at *9-10 (Tex. App.–Austin, April 7, 2016, no pet.) (mem. op. on reh'g, not designated for publication); *Parker v. State*, No. 03-15-00755-CR, 2016 Tex. App. LEXIS 7613 (Tex. App.—Austin 2016, pet. filed) (mem. op., not designated for publication).
- *Alvarez v. State*, No. 11-15-00201-CR, 2016 Tex. App. LEXIS 2223, at *5 (Tex. App.—El Paso 2016, pet. filed) (mem. op., not designated for publication)

The United States Supreme Court has yet to directly address the issue of free speech in the context of criminal solicitation of a minor, however every federal circuit court of appeal to have addressed the issue has uniformly held that soliciting minors for sexual activity is not a form of speech protected by the First Amendment.[7]

While the act of soliciting a child to engage in sexual conduct will functionally entail speech or some communicative action, such a solicitation is not "speech" within the terms of the First Amendment. Rather, solicitations seeking to

[7] *See:*

- *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) ("Speech intended deliberately to encourage minors' participation in criminal sexual conduct has no redeeming social value and surely can be outlawed under the same rationale that allows proscription of the provision of pornography to minors.")
- *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) ("[T]here is likewise no First Amendment right to persuade one whom the accused believes to be a minor to engage in criminal sexual conduct.").
- *United States v. Tykarsky*, 446 F.3d 458, 473 (3d Cir. 2006) ("There is no First Amendment right to persuade minors to engage in illegal sex acts.").
- *United States v. Howard*, 766 F.3d 414, 430 (5th Cir. 2014) ("Speech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime.").
- *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000) ("Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts.").
- *United States v. Johnson*, 376 F.3d 689, 696 (7th Cir. 2004) (Soliciting a minor to perform sexually explicit acts "is prohibited conduct, not protected speech.").
- *Neely v. McDaniel*, 677 F.3d 346, 351 (8th Cir. 2012) ("Offers to engage in illegal transactions [such as sexual assault of a child] enjoy no First Amendment protection.").
- *United States v. Meek*, 366 F.3d 705, 721 (9th Cir. 2004) ("The inducement of minors to engage in illegal sexual activity enjoys no First Amendment protection.").
- *United States v. Thomas*, 410 F.3d 1235, 1244 (10th Cir. 2005) ("Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sexual acts.").
- *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Speech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime.").

lure a child to sex assault are deemed "conduct" which finds no harbor in the protections of the Free Speech Clause. Because Penal Code § 33.021 does not implicate the protections of the First Amendment, the statute is presumed constitutional and Petitioner bears the burden of demonstrating otherwise. *See Clark*, 468 U.S. at 293.

b. Penal Code § 33.021(c) does not prohibit a substantial amount of protected speech in relation to its plainly legitimate sweep.

Although this Court has expressly recognized that the solicitation of children for sex is categorically excluded from First Amendment speech protection, Petitioner nonetheless contends that Penal Code § 33.021(c) is unconstitutionally overbroad in that it includes within its prohibitive sweep a substantial amount of protected speech. Specifically, Petitioner contends that the statute encompasses "protected speech between two adults who would be role-playing ages of under 17 to gratify sexual fantasies." (Petitioner's Brief at 14) This complaint is without merit as the inclusion of child-rape fantasy within the sweep of the statute constitutes an utterly insubstantial amount of speech in relation to the legitimate interest of child protection advanced by the statute.

Applicable Law

Under the "overbreadth" doctrine of the Free Speech Clause of the United State Constitution's First Amendment, a law may be declared facially unconstitutional if – in addition to legitimately proscribed conduct – it includes

within its sweep a substantial amount of protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002).

"The overbreadth doctrine is 'strong medicine' that is to be used 'sparingly and only as a last resort.'" *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015); *quoting New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988). This means that to invalidate a statute under the overbreadth doctrine, "[t]he statute must prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'" *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Regan v. Time*, 468 U.S. 641, 651 n.8 (1984). The person challenging the statute bears the burden of demonstrating from its text and from actual facts "that a substantial number of instances exist in which the Law cannot be applied constitutionally." *New York State Club Ass'n*, 475 U.S. at 14.

Application of Law

Petitioner asserts that Penal Code § 33.021(c) encompasses within its sweep "protected speech between two adults who would be role-playing ages of under 17 to gratify sexual fantasies." (Petitioner's Brief at 14) The definition of "minor" in

effect at the time of Petitioner's alleged conduct includes, "an individual who represents himself or herself to be younger than 17 years of age." Tex. Penal Code § 33.021(a)(1)(A) (2013). Petitioner imagines a circumstance where this definition would permit the statute to apply when "two adults may fantasize in a meet-up, pretending to be strangers, while one or both adults hold themselves out to be a minor." (Petitioner's Brief at 14) This type of role-playing child-rape fetish is termed "age-play" by its adherents and their defenders, and several courts of appeals have confronted and overruled the argument that Penal Code § 33.021 is overbroad for its potential application to these "ageplayers."[8]

[8] *See:*

- *Maloney v. State*, 294 S.W.3d 613, 628 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (Observing that "the incidence of the State seeking to prosecute two consenting adults engaging in online role playing or 'fantasy' would likely be exceedingly low.")
- *Ex parte Victorick*, No. 09-13-00551-CR, 2014 Tex. App. LEXIS 5429, at *14-15 (App.—Beaumont 2014, pet. ref'd) (mem. op., not designated for publication) ("The fact that the statute defines 'minor' to include otherwise legal communications with someone who may actually be over the age of 17 would not make the statute unconstitutionally overbroad because the 'overbreadth,' if any, would not be substantial when compared to the compelling and legitimate purpose of the statute.")
- *Ex parte Wheeler*, 478 S.W.3d 89, 95 (Tex. App.—Houston [1st Dist.] 2015 pet. ref'd) ("[W]e conclude that the legitimate reach of Penal Code section 33.021(c) dwarfs the threat of its arguably impermissible application to innocent ageplayers and that whatever overbreadth exists should be cured by thorough and case-by-case analysis and judicious use of prosecutorial discretion.").
- *Ex parte Fisher*, 481 S.W.3d 414, 420 (Tex. App.—Amarillo 2015, pet. ref'd) (Appellant failed to meet burden of showing substantial overbreadth in contending "ageplay" would be forbidden.).
- *Radford v. State*, No. 11-15-00108-CR, 2016 Tex. App. LEXIS 2226, at *5 (Tex. App.—Eastland, March 3, 2016, pet. filed) (mem. op., not designated for publication).
- *Chapman v. State*, No. 11-15-00215-CR, 2016 Tex. App. LEXIS 2231, at *5 (Tex. App.—Eastland, March 3, 2016, pet. filed) (mem. op., not designated for publication).
- *Alvarez v. State*, No. 11-15-00201-CR, 2016 Tex. App. LEXIS 2223, at *5 (Tex. App.—Eastland, March 3, 2016, pet. filed) (mem. op., not designated for publication).

Petitioner's argument requires this Court to measure whether child-rape fantasy role-playing constitutes a substantial amount of protected speech – in relation to the State's legitimate interest in protecting children from online sexual predators – such that the Texas's *Online Solicitation of a Minor* statute must be invalidated. Fortunately, this is an easy decision.

(1) The legitimate interest advanced by Penal Code § 33.021(c): the protection of children from online sexual predators.

The legitimate interest advanced by Penal Code § 33.021(c) is as obvious as it is important: the protection of minors from sexual predators who use online means to lure children as their prey. This Court expressly recognized this interest in *Ex parte Lo*: "There is no question that the State has a right – indeed a solemn duty – to protect young children from the harm that would be inflicted upon them by sexual predators." 424 S.W.3d 10, 21 (Tex. Crim. App. 2013). The *Lo* court also observed that § 33.021(c) is well suited for to advance this legitimate interest:

- *Mower v. State*, No. 03-14-00094-CR, 2016 Tex. App. LEXIS 3539, 2016 WL 1426517, at *9-10 (Tex. App.–Austin, April 7, 2016, no pet.) (mem. op. on reh'g, not designated for publication) ("Although appellant argues that section 33.021(c), as combined with subsection (d), could prohibit a person from soliciting another consenting adult to engage in fantasy age-play, a statute should not be invalidated for overbreadth merely because it is possible to imagine an unconstitutional application.")

United States District Courts have also confronted and overruled this argument. *See:*

- *Odom v. Adger*, No. 5:15-03249-MBS-KDW, 2016 U.S. Dist. LEXIS 141370, at *48-49 (D.S.C. 2016).
- *United States v. Peterson*, No. 1:13-CR-00010-P-BL-1, 2016 U.S. Dist. LEXIS 34821, at *6 (N.D. Tex. 2016)

"[T]he compelling interest of protecting children from sexual predators is well served by the solicitation-of-a-child prohibition in subsection (c)." 424 S.W.3d 10, 23.

(2) "Age-play" does not constitute a substantial amount of protected speech in relation to the legitimate interest advanced by the statute.

In comparison to this legitimate interest, Petitioner does not attempt here (or at the hearing on his pretrial writ)[9] to quantify or exemplify instances of consenting adults engaging in child-rape fantasy protected by the First Amendment. However, such behavior may be reasonably characterized as so extremely marginalized in the arena of adult sexual behavior that it fails to constitute a realistic circumstance presenting a substantial number of instances where the law cannot be applied constitutionally. We are therefore in the realm of imagined unconstitutional applications which the overbreadth doctrine strongly counsels courts to avoid as a basis judicial invalidation of statutes. As such, Petitioner fails to meet his burden to demonstrate that Penal Code § 33.021(c) includes within its sweep a substantial

[9] At the hearing on this pretrial writ of habeas corpus, Petitioner declined the opportunity to develop any factual record:

> [Prosecutor]: Just to be clear, the applicant does not want to put on evidence at this time; is that right?
>
> [Defense Counsel]: No, this is a facial challenge
>
> (RR 2015-W-0279 at 6)

amount of protected speech in relation to the legitimate interests advanced by the statute.

(3) This is what as-applied challenges and prosecutorial discretion are for.

The potential that § 33.021(c) would be used to prosecute consenting adults engaged in child-rape fantasy is the sort of remote possibility best suited for an as-applied challenge. This is the approach contemplated U.S. Supreme Court for potential but not quite substantial overbreadth: "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). When the overbreadth doctrine is described as "strong medicine," it is with the understanding that the targeted remedy of an "as applied" challenge is always available to address the occasional malignancy. As one Texas court of appeals held: "[T]he legitimate reach of Penal Code section 33.021(c) dwarfs the threat of its arguably impermissible application to innocent ageplayers and that whatever overbreadth exists should be cured by thorough and case-by-case analysis and judicious use of prosecutorial discretion." *Ex parte Wheeler*, 478 S.W.3d 89, 95 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

The exercise of prosecutorial discretion should also not be discounted in assessing whether the purported overbreadth is not only "substantial" but also "realistic." Petitioner does not offer the Court a single example of an actual

prosecution of an individual knowingly engaged in "age-play" with another adult in the 10 year history of Penal Code § 33.021. To believe that that such a prosecution is realistically possible requires one to wholly disregard the better judgment of professional prosecutors. Indeed, to working prosecutors, who view the *Online Solicitation of a Minor* offense as a valuable tool for the protection of children in their communities, the suggestion that the law would be used to prosecute role-playing adults hits somewhere between bewildering and insulting.

Because the amount of hypothetically protected speech that Penal Code § 33.021(c) includes in its sweep is utterly insubstantial in comparison to the legitimate interests advanced by the statute, the statute may not be struck down as constitutionally overbroad. Accordingly, Petitioner's overbreadth challenge is without merit, and the lower court was correct in holding so.

c. The lower court's holding is correct and should be affirmed.

When the court below overruled Petitioner's overbreadth challenge, it relied on this Court's holding in *Ex parte Lo*, which "distinguished the unconstitutional speech prohibition of [Penal Code § 33.021] subsection (b) from the conduct-based prohibition of the solicitation provision in subsection (c)" and expressly declared that "'offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from *First Amendment* protections.'" *Ex parte Ingram*, No. 04-15-00459-CR, 2016 Tex. App. LEXIS 4331, 2016 WL 1690493, at *12 (Tex.

App.—San Antonio, Apr. 27, 2016, pet. granted) (mem. op., not designated for publication); *quoting Ex parte Lo*, 424 S.W.3d 10, 16-17 (Tex. Crim. App. 2013). The lower court then observed that "the amount of hypothetically protected speech [such as child-rape fantasy] that Texas Penal Code section 33.021(c) includes within its sweep is utterly insubstantial in comparison to the legitimate interests advanced by the statute." *Id*. at 12-13. The court disposed of the issue by holding that, "because the statute does not implicate *First Amendment* speech protections and does not include within its sweep a substantial amount of protected speech, we conclude that section 33.021(c) is not overbroad." *Id*. at 13.

The court of appeals applied the appropriate principles of law and exercised sound reasoning in reaching the correct holding that Petitioner's overbreadth complaint is without merit. Accordingly, the holding of the lower court should be affirmed.

3. VAGUENESS

Petitioner also complains that the lower court erred in holding Penal Code § 33.021(c) is not unconstitutionally vague. This point is insufficiently briefed; the only specific assertion Petitioner offers is: "Section 33.021 forbids 'solicitation' that is not intended to result in a meeting." (Petitioner's Brief at 15) However, taken in conjunction with his due process and overbreadth arguments, Petitioner appears to contend that the portion of the solicitation offense of Penal Code § 33.021(c) – which requires the actor to solicit a minor to meet *with the intent that the minor will engage in sexual activity* – is rendered unconstitutionally vague by the defense-preclusion provision of § 33.021(d) – which states that it is not a defense that the actor was *engaged in a fantasy* or *did not intend for the meeting to occur*. This complaint is without merit as the two statutory subsections at issue are separate and distinct, providing sufficient definiteness to allow persons of ordinary intelligence what conduct is prohibited, and the statute does not permit arbitrary and discriminatory enforcement.

Applicable Law

A statute may be unconstitutionally vague if "its prohibitions are not clearly defined." *State v. Markovich*, 77 S.W.3d 274, 279 (Tex. Crim. App. 2002). There is no general entitlement to a perfectly written statute, but only to a statute which gives fair warning of the offense. *Id.* The doctrine "requires that a penal statute

define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement." *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006) (Holding a noise ordinance was not unconstitutionally vague); *see also Grayned v. City of Rockfor*d, 408 U.S. 104, 108 (1972).

"In examining a criminal statute for vagueness, one should ignore engaging in a mere rhetorical critique and instead focus the examination upon a concept of fairness." *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989). In a vagueness analysis, the burden rests on the party challenging the statute to establish its unconstitutionality. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002).

Application of Law

a. Subsections (c) and (d) are separate, distinct, and readily discernible.

As with his due process complaint above, Petitioner's argument confuses the specific intents respectively required by subsections (c) and (d) of Penal Code § 33.021. As briefed at length under section 1.b-c. above, subsection (c) requires a specific sexual intent that applies at the time the solicitation occurs, while subsection (d) limits a defense regarding a specific intent to meet after the completion of the solicitation. A fair and sober reading of the statute reveals the subsections to be separate, distinct, and discernible. Thus, persons of ordinary

intelligence are not left to guess at the statute's meaning, fair notice of prohibited conduct is readily provided, and there is no risk of arbitrary or discriminatory enforcement.

b. Every court to have reviewed Penal Code § 33.021(c) for vagueness has had no difficulty discerning the meaning of the statute.

In addition to the court below, a number of courts of appeals have considered and overruled claims that Penal Code § 33.021 is unconstitutionally vague. *See Maloney v. State*, 294 S.W.3d 613, 629 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("[S]ection 33.021 is sufficiently clear to give appellant adequate notice that his conduct was a criminal offense."); *Ex parte Zavala*, 421 S.W.3d 227, 230 (Tex. App.—San Antonio 2013, pet. ref'd); *Ex parte Victorick*, No. 09-13-00551-CR, 2014 Tex. App. LEXIS 5429, at *14-15 (App.—Beaumont 2014, pet. ref'd) (mem. op., not designated for publication) ("[S]ection 33.021(c) is not unconstitutionally overbroad or vague, and we conclude that the statute provides fair notice of the prohibited conduct."); *Ex parte Wheeler*, 478 S.W.3d 89, 96 (Tex. App.—Houston [1st Dist.] 2015, pet ref'd) ("[C]onstruction of the statute eliminates any supposed conflict between subsection (c) and subsection (d)(2)."); *Ex Parte Fisher*, 481 S.W.3d 414, 420-21 (Tex. App.—Amarillo 2015, pet. ref'd); *Chapman v. State*, No. 11-15-00215-CR, 2016 Tex. App. LEXIS 2231, at *8 (Tex. App.—Eastland, March 3, 2016, pet. filed) (mem. op., not designated for publication) ("Although former subsections (d)(2) and (d)(3) may not have been

models of clarity, we are of the opinion that a person of ordinary intelligence would have known what conduct was prohibited by those provisions.")

c. The lower court's holding is correct and should be affirmed.

In overruling Petitioner's vagueness challenge, the court below held that the statute was sufficiently definite, "[b]ecause the requirements contained within subsections 33.021(c) and (d) are separate and distinct for when each becomes applicable relative to the act of solicitation." *Ex parte Ingram*, No. 04-15-00459-CR, 2016 Tex. App. LEXIS 4331, 2016 WL 1690493, at *16 (Tex. App.—San Antonio, Apr. 27, 2016, pet. granted) (mem. op., not designated for publication). The court of appeals applied the appropriate principles of law and exercised sound reasoning in reaching the correct holding that Petitioner's vagueness complaint is without merit. Accordingly, the holding of the lower court should be affirmed.

4. DORMANT COMMERCE CLAUSE

Petitioner also complains the lower court erred in holding that that Penal Code § 33.021 does not violate the "Dormant Commerce Clause" of United States Constitution. Petitioner contends that the statute unduly burdens interstate commerce by attempting to place regulations on the entirety of the Internet. (Petitioner's Brief at 16). This complaint is without merit as the lower court correctly held that the statute (1) does not discriminate between intra and interstate commerce and (2) serves the important governmental interest of protecting children from online sexual predators, while the burden it places on interstate commerce is, at most, incidental.

Applicable Law

The Commerce Clause grants Congress the power to regulate commerce among the several states. *See* U.S. Const. Art. 1 § 8, cl. 3. However, the Commerce Clause has long been understood to have a "negative" aspect that denies the states the power to unjustifiably to discriminate against or burden the interstate flow of articles of commerce. *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). This negative aspect is commonly referred to as the "Dormant Commerce Clause."

In evaluating whether a state statute offends the Dormant Commerce Clause, a reviewing court first asks whether the statute "regulates evenhandedly

with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Or. Waste Sys.* 511 U.S. at 99; *see also Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979). If the statute is discriminatory, in that it benefits in-state commerce while burdening interstate commerce, then the law is "virtually *per se* invalid." *Or. Waste Sys.*, 511 U.S. at 99. If the statute is nondiscriminatory, the reviewing court applies the test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under *Pike*, the reviewing court asks (1) whether there is a legitimate local public interest advance by the law, then (2) whether the burden imposed on interstate commerce by the law is "clearly excessive in relation to the putative local benefits." *Id.* at 142. If the statute is an even-handed advancement of a local public interest, and the effects on interstate commerce are not clearly excessive, the statute will be upheld. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

Application of Law

a. Penal Code § 33.021 does not discriminate between intrastate and interstate commerce.

Penal Code § 33.021 is plainly non-discriminatory; it does not by its terms or conceivable application favor intrastate commerce while burdening interstate commerce. Petitioner does not attempt to quantify or describe any burdens that Penal Code § 33.021 places on interstate commerce or identify any legitimate commerce whatsoever that may be affected by the statute. This is

undoubtedly because the statute's prohibition of online solicitation of minors for sexual activity does not conceivably affect any form of legitimate commerce in anything but the most incidental manner (e.g., bandwidth usage). *See State v. Backlun*d, 672 N.W.2d 431, 438 (N.D. 2003) (Upholding North Dakota statute criminalizing the luring of a minor with a computer, because "it is difficult to ascertain any legitimate commerce that is derived from the willful transmission of explicit or implicit sexual communications to a person believed to be a minor in order to willfully lure that person into sexual activity.").

As Penal Code § 33.021 does not discriminate between interstate and intrastate commerce, the *Pike* analysis now asks whether the legitimate interests advanced by the statute are clearly outweighed by any burden the law may impose on interstate commerce.

b. Penal Code § 33.021 advances the legitimate interest of protecting children from sexual predators with, at most, incidental effects on interstate commerce.

The legitimate local public interest advanced by the Penal Code § 33.021 is (again) as obvious as it is important: the protection of minors from sexual predators who use online means to lure children as their prey. *See Ex parte Lo*, 424 S.W.3d at 21 ("There is no question that the State has a right – indeed a solemn duty – to protect young children from the harm that would be inflicted upon them by sexual predators."); *see also New York v. Ferbe*r, 458 U.S. 747, 757

(1982) (The "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

In relation to this legitimate and supremely important interest, the effect that the statute has on interstate commerce is at best speculative and at most incidental. Again, there is no legitimate commerce directly affected by Texas's prohibiting the use of online communications as a means to sexually victimize children, and any indirect effects the statute may have on interstate commerce are so insignificant as to be incalculable.

c. *American Libraries Association v. Pataki*, provides neither authority nor sound reasoning for overturning Penal Code § 33.021.

The only authority Petitioner cites for the proposition that Penal Code § 33.021(c) offends the Dormant Commerce Clause is *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). This unreviewed federal district court preliminary-injunction ruling of the dial-up Internet age has had the unfortunate legacy of being routinely trotted out for the proposition that the states may not prohibit otherwise criminal conduct which utilizes the Internet in some respect. No other court – state or federal – has followed its reasoning.

The *Pataki* court held that a New York statute, which prohibited sending harmful content to a minor using the Internet, violated the Dormant Commerce Clause. 969 F. Supp. at 179. *Pataki* essentially reasoned that the statute regulated conduct occurring wholly outside of New York and this fact placed a

burden on interstate commerce disproportionate to the local benefit of the regulation.

The statute in *Pataki* is distinguishable from Penal Code § 33.021(c) in that the New York statute concerned communication of explicit material to minors whereas § 33.021(c) prohibits the sexual solicitation of minors. The distinction between solicitation between explicit communication and solicitation laws was recognized by even the *Pataki* court.[10]

Unlike the statute at issue in *Pataki*, Penal Code § 33.021 does not regulate behavior occurring outside of the state. When Penal Code § 33.021 is read in conjunction with the jurisdictional limitations imposed on criminal prosecutions by Penal Code § 1.04 (*Territorial Jurisdiction*), it is plain that the offense cannot regulate behavior occurring wholly outside the state of Texas. *See People v. Garelic*k, 161 Cal. App. 4th 1107, 1122 (2008) (California law prohibiting distribution of harmful material to minor over Internet did not regulate conduct outside state, because "California law generally bars punishment for wholly extraterritorial offenses."); see also *State v. Hantz*, 372 Mont. 281, 288 (2013) (Montana's child-solicitation act regulates no behavior outside of state, because "Montana may prosecute only those criminal acts that occur within Montana.")

[10] "Plaintiffs do not challenge the sections of the statute that criminalize the sale of obscene materials to children, over the Internet or otherwise, and prohibit adults from luring children into sexual contact by communicating with them via the Internet." 969 F. Supp. 160, 179 (S.D.N.Y. 1997).

Just three years after the *Pataki* case, the United States District Court for the Western District of Texas recognized the decision's fundamental flaw: "If the Court were to accept the plaintiff's interpretation of *American Libraries Association v. Pataki*, (S.D.N.Y. 1997), then all state regulatory schemes would fall before the mighty altar of the internet." *Ford Motor Co. v. Tex. DOT*, 106 F. Supp. 2d 905, 909 (W.D. Tex. 2000) (Holding that Texas's regulation of vehicle sales over the internet did not violate the dormant commerce clause.); *aff'd by Ford Motor Co. v. Tex. DOT*, 264 F.3d 493 (5th Cir. 2001). The *Pataki* case, after some twenty years of universal disregard, should be recognized by this Court as a non-precedential anomaly of the incipient years of the general Internet.

d. The lower court's holding is correct and should be affirmed.

The court below distinguished the statute at issue in *Pataki*, "aimed at limiting exposure of harmful content by minors," from section 33.021(c), which "criminalizes online solicitation of minors with the intent to engage in sexual conduct." *Ex parte Ingram*, No. 04-15-00459-CR, 2016 Tex. App. LEXIS 4331, 2016 WL 1690493, at *17 (Tex. App.—San Antonio, Apr. 27, 2016, pet. granted) (mem. op., not designated for publication). The lower court then observed that the Texas statute "does not differentiate between intrastate and interstate commerce," and that "that any effect of section 33.021(c) on interstate commerce is only incidental in relation to the local benefit." *Ingram* at *18. The court concluded

that Texas Penal Code § 33.021(c) does not violate the Dormant Commerce Clause.[11] *Id*.

The court of appeals applied the appropriate principles of law and exercised sound reasoning in reaching the correct holding that Petitioner's Dormant Commerce Clause complaint is without merit. Accordingly, the holding of the lower court should be affirmed.

5. RETROACTIVITY OF RECENT AMENDMENTS TO PENAL CODE § 33.021

[11] This is the same holding reached by every other court of appeals to have considered the application of the Dormant Commerce Clause to Texas Penal Code § 33.021(c). *See:*

- *Ex parte Fisher*, 481 S.W.3d 414, 422 (Tex. App.—Amarillo 2015, pet. ref'd).
- *Collins v. State*, 479 S.W.3d 533, 542 (Tex. App.—Eastland 2015, no pet.) (Overruling Dormant Commerce Clause challenge to Penal Code § 33.021 operating through *Improper Relationship between Educator and Student* offense of § 21.12.).
- *State v. Paquette*, 487 S.W.3d 286, 291 (Tex. App.—Beaumont, Feb. 24, 2016, no pet.).
- *Ex parte Wheeler*, 478 S.W.3d 89, 97 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).
- *Radford v. State*, No. 11-15-00108-CR, 2016 Tex. App. LEXIS 2226, at *8 (Tex. App.—Eastland, March 3 2016, pet. filed) (mem. op., not designated for publication).
- *Alvarez v. State*, No. 11-15-00201-CR, 2016 Tex. App. LEXIS 2223, at *8 (Tex. App.—El Paso, March 3, 2016, pet. filed) (mem. op., not designated for publication).
- *Chapman v. State*, No. 11-15-00215-CR, 2016 Tex. App. LEXIS 2231, 2016 WL 859366, at *4 (Tex. App.—Eastland Mar. 3, 2016, pet. filed) (mem. op., not designated for publication).
- *Ex parte Goetz*, No. 09-15-00409-CR, 2016 Tex. App. LEXIS 3223, at *4 (Tex. App. — Beaumont, March 30, 2016, pet. ref'd) (mem. op., not designated for publication).
- *Ex parte Mahmoud*, No. 09-15-00424-CR, 2016 Tex. App. LEXIS 3224, at *4 (Tex. App.— Beaumont, March 30, 2016, pet. filed) (mem. op., not designated for publication).
- *Leax v. State*, Nos. 09-14-00452-CR, 09-14-00453-CR, 2016 Tex. App. LEXIS 3768, at *6 (Tex. App.—Beaumont, April 13, 2016, pet. granted) (mem. op., not designated for publication).
- *Parker v. State*, No. 03-15-00755-CR, 2016 Tex. App. LEXIS 7613, at *6 (Tex. App. — Austin, July 19, 2016, pet. filed) (mem. op., not designated for publication).

Petitioner contends that recent amendments to Penal Code § 33.021 should be applied "retroactively" or otherwise confer some persuasive force to the benefit his claims. (Petitioner's Brief at 17-19) Petitioner's arguments are without merit, because (1) the amended statute cannot be applied retroactively as the Legislature clearly and validly mandated that the previous version of the statute would apply to offenses committed before September 1, 2015, and (2) the amended statutes carry no persuasive weight as viewing statutory amendments as a persuasive factor in an analysis of a statute's constitutionality would chill the Legislature's inclination to reform laws.

In *Ex parte Lo*, this Court held that Penal Code § 33.021(b) – the *sexually explicit communications* provision – was unconstitutionally overbroad. In the legislative session that followed the *Lo* decision, the Legislature enacted S.B. 344. *See* Tex. S.B. 344, 84th Lee., R.S. (2015). That act substantially modified several portions of the *Online Solicitation of a Minor* statute. Subsection (b) was reformulated to require the specific intent to commit certain sex offenses rather than sexual gratification.[12] *Id*. at § 2. The definition of "minor" was redefined by

[12] The amendment of Penal Code § 33.021(b) – the *sexually explicit communications* provision – reads:

> (b) A person who is 17 years of age or older commits an offense if, with the intent to commit an offense listed in Article 62.001(5)(A), (B), or (K), Code of Criminal Procedure [~~arouse or gratify the sexual desire of any person~~], the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:

deleting reference to one who represents himself to be a minor.[13] *Id*. at § 2. Finally, the defense-preclusion provisions of subsection (d) were amended to leave "that the meeting did not occur" as the only remaining proscribed defense.[14] *Id*. at § 2.

a. The current version of Penal Code § 33.021 may not be applied to Petitioner's conduct.

Petitioner contends that the current version of Penal Code § 33.021 should "retroactively" apply to him. By this, Petitioner would ask this Court to remand his case for trial under the statute as amended rather than as it stood the time of his alleged offense. The only authority Petitioner cites for this proposition is the case of *Teague v. Lane*, 489 U.S. 288 (1989) (Denying retroactive application of the Batson rule to a habeas corpus petitioner). *Teague* dealt with whether and when "new" constitutional rules expressed by the courts should be applied retroactively

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(1) communicates in a sexually explicit manner with a minor; or

(2) distributes sexually explicit material to a minor.

[13] The amendment of Penal Code § 33.021(a)(1) – the definition of "minor" – reads:

(1) "Minor" means:

(A) an individual who is [~~represents himself or herself to be~~] younger than 17 years of age; or

(B) an individual whom the actor believes to be younger than 17 years of age.

[14] The amendment of Penal Code § 33.021(d) – the defense-preclusion provision – reads:

(d) It is not a defense to prosecution under Subsection (c) that [~~:~~

[~~(1)~~] the meeting did not occur [~~,~~

[~~(2) the actor did not intend for the meeting to occur, or~~

[~~(3) the actor was engaged in a fantasy at the time of the commission of the offense~~].

in post-conviction habeas corpus proceedings, and the case is inapposite to the issue of whether statutory amendments should be applied retroactively.

Legislative amendments to criminal statutes may be applied retroactively to conduct occurring before the amendments without violating the *ex post facto* clause of the United States Constitution[15] if they do not disadvantage the accused. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("[T]he constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them."). Similarly, the Texas Constitution's prohibitions on *ex post facto* and "retroactive" laws apply where the law is disadvantageous or punitive toward the accused. Tex. Const. art. I, § 16; *Grimes v. State*, 807 S.W.2d 582, 586 (Tex. Crim. App. 1991) (adopting Supreme Court's definition of ex post facto in interpreting Tex. Const.art. I, § 16).

Since the amendments to Penal Code § 33.021 have no apparent disadvantageous effect on Petitioner, the question of whether the new statute applies retroactively is one of legislative intent. The Code Construction Act provides: "A statute is presumed to be prospective in its operation unless expressly made retrospective." Tex. Gov't Code § 311.022. However, where the Legislature makes clear that the statute is to be applied prospectively, that statement of intent controls. *See Sims v. Adoption Alliance*, 922 S.W.2d 213, 215 (Tex. App.—San

[15] Art. 1, § 10, U.S. Const.

Antonio 1996) ("The plain meaning of the statute controls" where the enactment provides an effective date and mandates prospective applicability.) "Doubts as to retroactivity are resolved against the retroactive application of a statute." *Ex parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981).

Reading S.B. 344, the Legislature's intent that the statute be applied prospectively (and not retroactively) could not have been more clearly stated. The Act expressly designated its effective date as "September 1, 2015" and further provided that all offenses committed before that date were to be governed by the previous version of the statute:

> SECTION 3. The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.
>
> SECTION 4. This Act takes effect September 1, 2015.

Tex. S.B. 344 §§ 3, 4, 84th Lee., R.S. (2015).

The Legislature clearly stated the previous version of Penal Code § 33.021 was to apply to offenses committed prior to September 5, 2015. Petitioner is alleged to have committed his offense on May 21, 2013. Therefore, the amendments to Penal Code § 33.021 may not be applied to this case, and Petitioner's argument for retroactive application is without merit.

d. The amendments to Penal Code § 33.021 should not be considered persuasive authority by this Court.

Petitioner also argues that the Legislature's amendment of Penal Code § 33.021 in 2015 represents persuasive authority that the statute is unconstitutional. Petitioner cites no example of any court viewing statutory amendments as a concession that the previous version of the statute was unconstitutional, and the Legislature's amendments of the *Online Solicitation of a Minor* statute should carry no persuasive authority with this Court on the issue of the statute's constitutionality.

The Legislature is free to reform the applicable parameters of a statute within constitutional boundaries, and such an amendment does not amount to concession that the previous version of the statute was unconstitutional. States are free to enact greater protections for the exercise of constitutionally protected rights than are mandated by the Constitution itself. *See Oregon v. Has*s, 420 U.S. 714, 719 (1975); *see also Heitman v. Stat*e, 815 S.W.2d 681, 683 (Tex. Crim. App. 1991). For a reviewing court to take a legislative amendment as giving license to strike down previous versions of a statute would have a regrettable chilling effect on the Legislature's motivation to reform criminal offenses and

other statues.[16]

In our system of law, it is the reviewing courts that determine whether a statute offends constitution principles, not legislative bodies. *See Marbury v. Madiso*n, 5 U.S. (1 Cranch) 137, 177 (1803) (In deciding the constitutionality of a law, "It is emphatically the province and duty of the judicial department to say what the law is.") Accordingly, the version of Penal Code § 33.021 with which Petitioner stands charged should be adjudged by applicable constitutional standards and without regard to subsequent legislative amendments.

[16] This is similar to the rationale underlying several Rules of Evidence that exclude evidence of subsequent corrective and mitigating measures in order to avoid deterring individuals from taking such measures out of fear that they will be later used against them. *See* Tex. R. Evi. 407 (Subsequent Remedial Measures); 408 (Compromise and Offers to Compromise); 409 (Payment of Medical and Similar Expenses).

PRAYER FOR AFFIRMATION

BY THE FORGOING REASONS AND AUTHORITIES, the State of Texas prays this Honorable Court affirm the decision of the Fourth Court of Appeals so that this case may proceed to trial on the merits.

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies pursuant to Texas Rule of Appellate Procedure 9.4(i)(2)(B), that the State's Brief in Response filed this day contains 8,954 words. Counsel relies for his certification on the word count of the computer program used to prepare this document: Microsoft Word 2010.

S. Patrick Ballantyne

CERTIFICATE OF SERVICE

I, S. Patrick Ballantyne, hereby certify that a true and correct copy of this Brief was transmitted this 14th day of November, 2016, to Donald H. Flanary, III, attorney of record for Appellant, by electronic service through a court-approved eFiling service.

S. Patrick Ballantyne